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IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION, *Petitioner,* v. CALAVERAS CEMENT COMPANY, PACIFIC PORTLAND CEMENT COMPANY, SANTA CRUZ PORTLAND CEMENT COMPANY, SPOKANE PORTLAND CEMENT COMPANY, YOSEMITE PORTLAND CEMENT CORPORATION, OREGON PORTLAND CEMENT COMPANY, SOUTHWESTERN PORTLAND CEMENT COMPANY (Victorville), *Respondents.*	Nos. 26 and 24

BRIEF OF SEVEN PACIFIC COAST RESPONDENTS

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IN THE

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FEDERAL TRADE COMMISSION,

Petitioner,

v.

CALAVERAS CEMENT COMPANY, *et al.*,

Respondents.

Nos. 26 and 24

BRIEF OF SEVEN PACIFIC COAST RESPONDENTS

This brief is filed on behalf of the seven Pacific Coast respondents in Nos. 26 and 24, they being the Calaveras Cement Company, Pacific Portland Cement Company, Santa Cruz Portland Cement Company, Spokane Cement Company, Yosemite Portland Cement Company (in No. 26), Oregon Portland Cement Company and Southwestern Portland Cement Company (Victorville) (in No. 24), whose mills are situated on the Pacific Coast and which are similarly affected by the facts and the law. As the Commission has reported, the marketing methods and practices of the mills on the Pacific Coast differ markedly from those existing in other sections of the country.[1] Accordingly, this brief will show the special position of the above named seven respondents and argument will be addressed thereto. Each of the said respondents, as found by the Commission, is a

[1] Report to the Senate (Document No. 71, 73rd Congress, 1st Session), pp. 115, 127.

wholly independent company owning and operating one cement mill[2] situated in northern or southern California or the Pacific-Northwest territory.[3] Each of said companies will be hereinafter referred to by the short title by which it is designated in Paragraph One of the Findings. To save space, and for the convenience of the court, reference is here made to the statement of the case in its larger aspects which appears in the brief of the respondents in cases Nos. 23, 24 and 34 and to the arguments there made and the authorities cited, where such arguments and authorities are suitable to the defense of these seven respondents.

Opinion Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 16761-16821) is reported in 157 F. (2d) 533.

Statement of the Case

This case is before this Court on the Federal Trade Commission's petition to review judgments of the Circuit Court of Appeals for the Seventh Circuit entered on October 31, 1946 which set aside an order to cease and desist issued by the Commission on July 17, 1943 against the respondents on whose behalf this brief is filed and the other cement producers in the companion cases.

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[2] Oregon Portland Cement Company owns and operates two mills both of which are situated in the State of Oregon. Southwestern Portland Cement Company, in addition to its mill at Victorville, California, owns and operates one mill situated at El Paso, Texas and one mill situated at Osborn, Ohio. Fdgs. Par. One (2z) (3k), R. Vol. 24, 15973, 15975.

[3] Fdgs. Pars. One (k) (2z) (3a) (3h) (3k) (3l) (4a), Four (b), R. 15964, 15973-75, 15979, 15982.

To avoid the repetition herein of matter or material which is the same in cases Nos. 23, 24, 25 and 34, the Seven Pacific Coast Respondents expressly adopt by this reference thereto the matter and material set out at pages 3 to 14, inclusive, of the Brief of Respondents in cases Nos. 23, 24 and 34, including of course, the Topical Digest of the Evidence which the respondents in said cases have submitted as Appendix A to their brief herein. Part XVII in Volume IV of said Appendix A, entitled "The Pacific Coast", is a statement of the facts which in any way affect these seven respondents and appropriate reference will be made to it herein for the convenience of the Court.

These seven respondents will make no separate argument herein respecting Count Two of the Commission's complaint or respecting the jurisdiction or bias of the Commission. Instead, they expressly rely upon the presentation and argument made in the brief of respondents in Nos. 23, 24 and 34 for the first and upon the presentation and argument made by Marquette in No. 25, for the second and third.

ARGUMENT

At page 93 of its brief herein the Commission states: "We submit that if this Court determines that the Institute was properly found to have been supporting and maintaining the multiple basing-point delivered price system and elimination of price competition among respondents, then the undisputed fact that the 13 respondents (inclusive of these seven Pacific Coast respondents) were members of the Institute, plus the fact that their pricing practices did not vary significantly from the pricing system used by the other respondents, are sufficient to support the Commission's findings and order as to these respondents." And

upon this statement plus its construction of the purpose of the Institute, plus eight classes of activities pursued by the Institute, all of which are enumerated in footnote 57 at page 94 of the said brief, and plus a statement of a well-known rule of law which is made in the last sentence on page 95 of that brief, the Commission rests its case in this court for a reversal of the judgment of the lower court as to these seven respondents.

We submit that the Institute was not "properly found to have been supporting and maintaining the multiple basing-point delivered price system and elimination of price competition," and that, if it was properly so found as to any respondents, there is no evidence in the record from which it could be reasonably inferred that any of these seven respondents knowingly participated or acquiesced in any unlawful activities. And we submit further that the pricing practices of these seven respondents did "vary significantly from the pricing system used by the other respondents."

POINT ONE

The Commission has made no findings to support its order against any of these seven respondents.

A. Neither the Nationwide Conspiracy as Charged Nor Participation Therein By Any of These Seven Respondents is Found Anywhere In the Findings.[1]

The Theory of the Order. The Commission's Order rests upon the charge of a nationwide conspiracy to employ and the actual cooperative employment of, according

[1] Statement of Points Nos. 8(e), 9(a-h), 34(a-c), 35-37, R. 24, 16237-39, 16279.

to its characterization, "what is known as a multiple basing point system of pricing" in violation of Section 5 of the Federal Trade Commission Act. Counsel for the Commission *conceded* that conspiracy is the only issue in the case.[2] To be sustained as to these seven petitioners, the Commission's Order must be supported by a finding and conclusion, and by evidence sufficient to warrant such finding and conclusion, *separately* as to each of these seven respondents, notwithstanding its sufficiency as to other respondents. *Western Sugar Refinery Company, et al.* v. *Federal Trade Commission,* 275 Fed. 725, 732 (1921).

The Findings. From what has been said it is clear that the existence of the nationwide conspiracy as charged and participation therein by these seven respondents must be proved and found by the Commission beyond peradventure. But nowhere in the Findings is there any finding that the conspiracy as charged now exists or ever did exist. Likewise, the Commission has failed to make any finding that any of these seven respondents was ever a party to the conspiracy as charged, even if it be assumed that there is any valid finding that the conspiracy as charged exists or ever did exist, which is neither found nor proved. Thus, the law of conspiracy and the essential requirement that those charged with being conspirators be legally connected with the alleged conspiracy is totally ignored in the Findings. *United Mine Workers of America* v. *Coronado Coal Company,* 259 U. S. 344, 408 (1922); *Thomas* v. *United States,* 57 F. (2d) 1039, 1042 (1932); *Nibbelink* v. *United States,* 66 F. (2d) 178, 179 (1933).

Moreover, the Commission has wholly failed to indicate which, if any, of these seven respondents has been shown

[2] R. 12129.

by the evidence to be connected with the purported findings which it has made. Instead the Commission has contented itself with indiscriminate references to "the respondents" or "a number of respondents" or "some respondents", or "respondents in different localities", with regard to totally unrelated acts, policies and practices of the different respondent companies, of which there are some seventy-five scattered from Pennsylvania to Western Washington and from Florida to Southern California, in fact throughout the United States, and most of whom are not in competition with any of these seven respondents. The poverty of the Commission's case is at once apparent here. These seven respondents are not mentioned in the Findings with the exception of Paragraph One, wherein they are merely described as respondents, and Par. Eight (1) wherein some of them are mentioned in one or two garbled excerpts from letters relating to compliance with the NRA Code. Other than this, Par. Eight (o) refers ambigously to "certain respondents on the Pacific Coast" and Par. Seven (m) purports to describe pricing methods "in California" without specifying which respondent are referred to. Obviously, this ambiguous reference by only including "certain respondents" effectively excludes certain respondents on the Pacific Coast. The above mentioned findings are inaccurate and inconsistent with the evidence and they will be dealt with *ad seriatim* hereinafter (see Point II, *infra*, pp. 8, *et seq.*). Elsewhere in the Findings, as will be shown, the evidence is repeatedly distorted and otherwise misrepresented, and conclusions and inferences are drawn which are wholly unfounded and arbitrary. It is submitted that such vagueness, generality, and inaccuracy in the Findings, particularly in a case of

this nature, clearly violates the requirement that findings must be definite, specific, and accurate. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 295 U. S. 193, 201 (1935); *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 563 (1938). The ambiguous and evasive character of the Findings is presumptive evidence that no facts exist which could support findings against these seven respondents essential to a determination that they have been connected with the conspiracy as charged. And the presumption thus arising is made conclusive by the absence of the essential finding that any of these seven respondents was connected with the alleged nationwide conspiracy. *Heuser* v. *Federal Trade Commission,* 4 F. (2d) 632, 634 (1925).

The Commission has failed to make findings with respect to the material facts. Practically none of the evidence offered by these and other respondents as to the facts which constitute their grounds of defense, and which went unchallenged by counsel for the Commission, appears in either the Trial Examiner's Report or the Findings. *A. E. Staley Mfg. Co., et al.* v. *Federal Trade Commission,* 135 F. (2d) 453, 456 (1943); *Federal Trade Commission* v. *Curtis Publishing Company,* 260 U. S. 568, 580 (1923); *Saginaw Broadcasting Company* case, *supra,* at p. 563. For a complete statement of the material facts and the deficiencies in the Findings in so far as they relate to respondents, the Court is respectfully referred to Appendix A, Part XVII.

In view of the vagueness and inadequacy of the Commission's Findings and the fact that only a small portion of the evidence in this proceeding even indirectly relates to these seven respondents whose plants are situated on

the Pacific Coast, commercially and, in practical effect, geographically isolated from the rest of the country, it would be futile to attempt to make detailed reference to each of the purported findings. To do so would simply require repeating as to each such finding that there is no evidence to support it with respect to any of these seven respondents. We shall in this brief, therefore, limit ourselves to the proof and findings which must be made with respect to the activities and practices of each of these seven respondents if they are to be connected with the nationwide conspiracy as charged.

POINT TWO

There is no evidence to justify findings or an order against any of these seven respondents based upon the charge of a nationwide conspiracy to employ "what is known as a multiple basing point system of pricing" in violation of Section 5 of the Federal Trade Commission Act.

A. Neither the Nationwide Conspiracy as Charged Nor Participation Therein by Any of These Seven Respondents Has Been Proved Now to Exist or Ever to Have Existed.

1. No Agreement or Conspiracy Has Been Proved or Shown in the Use of Delivered Prices By Any of These Seven Respondents.

The Charge. The complaint makes it plain that this is a proceeding directed primarily toward doing away with the use of delivered prices in the sale of Portland Cement as an allegedly unfair method of competition within the intent and meaning of Section 5 of the F.T.C. Act.[1]

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[1] Cf. Complaint, Count I, Par. Five (a) (b) (c) (d), R. 54-55.

The Findings. The Commission's argument with respect to the alleged conspiracy is that "substantially all sales of cement by the corporate respondents are made on the basis of a delivered price * * *",[2] but the Commission failed to state in its Findings the reason why cement is sold on that basis as shown by the undisputed evidence.

The Proof. The reason why cement has customarily been sold at delivered prices lies in the relative importance of transportation costs in the sale of cement. Portland cement, the subject matter of this proceeding, is a heavy and bulky product which is expensive to ship.[3] Counsel for the Commission *conceded* that transportation charges constitute a substantial part of the delivered cost of cement,[4] and it is so alleged in the complaint[5] and the Commission has so found.[6]

It is undisputed that the market for cement is at destination. The undisputed evidence is that the purchaser always buys cement on the basis of the delivered cost at the place of use, whether prices are quoted f.o.b. mill or f.o.b. destination, and that this is true of dealers, contractors, and public buyers, including all agencies of the Federal Government.[7] It was *conceded* by Commission's counsel that that is the reason why cement manufacturers have customarily quoted delivered prices, and the Trial Examiner rejected further evidence to the same effect.[8]

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[2] Fdgs. Par. Seven (a), R. 15988.

[3] App. A, Part I, p. 17; Part II, p. 176.

[4] R. 11117.

[5] Complaint, Count I, Par. Three, R. 41-42.

[6] Fdgs. Par. Three (a), R. 15980.

[7] App. A, Part XVII, pp. 2679, 2821.

[8] App. A, Part II, pp. 178-79; Part XVII, pp. 2703, 2758-59.

From the earliest days cement has been quoted and sold at delivered prices, although each of these seven respondents has quoted and sold on an f.o.b. mill basis upon request, particularly on Government sales, and still does so.[9] In the *Cement Manufacturers* case the Supreme Court found that "the custom in the cement trade of selling cement at a delivered price * * * was an established trade practice before the organization of the defendant association". (January, 1916). *Cement Manufacturers Protective Assoc.* v. *U. S.*, 268 U. S. 588, 590, 597 (1925). The undisputed evidence is that this trade practice has existed in the cement industry on the Pacific Coast for more than thirty years, and that the *non-respondent* manufacturers as well as the respondent manufacturers generally quote and sell at delivered prices.[10]

Moreover, the Clayton Act specifically authorizes sales at delivered prices. Section 2(a) excepts from the prohibition of discrimination in price differentials in price due to differences in cost of delivery, and Section 2(b) provides that a lower price to one purchaser than to another made to meet an equally low price of a competitor shall not be a prohibited discrimination. Both of these provisions would be meaningless unless the price thus permitted to be made is the price that is to represent the cost of the goods to the purchaser at the place of use.

For the foregoing reasons we contend that there is no evidence of agreement or conspiracy, and no support for any inference thereof, in the use of delivered prices by any of these seven respondents.

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[9] App. A, Part XVII, pp. 2698-703, 2729, 2784-91, 2832-42, 2846.

[10] App. A, Part XVII, pp. 2758, 2816.

2. No Agreement or Conspiracy Has Been Proved or Shown in the Uniformity of Prices or Price Quotations of Any of These Seven Respondents.

The Charge. The complaint alleges that respondents' prices to private buyers are uniform as regards the great preponderance of sales and that bids received from respondents by various branches of the Federal Government and other public bodies are identical in the great majority of cases.[1]

It is undisputed that none of these seven respondents participated in any of the bids referred to in the complaint and the said bids are not illustrative of the bidding practices of any of these seven respondents.

The Findings. The Commission has found no agreement as to basing points or base prices.[1a] The Commission has found that "ordinarily the commercial prices of all sellers of cement at any given delivery point are the same."[2] This Finding is accepted in so far as it has reference to openly published prices. The Commission has also found that what it calls the "multiple basing-point delivered-price system" was used by respondents "for the purpose and with the effect of producing identical prices."[3] This is a conclusion of law and it is untrue and without any support in the evidence with respect to any of these seven respondents.

The Findings also recite instances of bids submitted by manufacturers in certain parts of the country remote from

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[1] Complaint, Count I, Par. Six, R. 73-79.

[1a] Fdgs. Pars. Seven (b), Nine (c), R. 15988-89, 16028-29.

[2] Fdgs. Par. Nine (a), R. 16023.

[3] Fdgs. Pars. Twelve (a), Twenty-four (d), R. 16055, 16129-30.

the marketing territory of these seven respondents and assert that "The perfection of respondents' pricing formula in producing identical delivered prices is best illustrated * * * by sealed bids to public agencies."[4] The bids referred to are decidedly not illustrative of the practices of any of these seven respondents and this Finding is erroneous and untrue and is not supported by any evidence with respect to any of these seven respondents.

a. Commercial Prices.

The Proof. The Commission adverts to the tendency toward uniformity of price of cement and attempts to impute that tendency to the alleged use of what it calls "the multiple basing-point system of pricing",[5] completely ignoring the undisputed evidence as to the true reasons for it.

To begin with, identity of delivered prices has not existed to the extent that the Commission would make it appear. Published or quoted prices are not necessarily the same as actual prices and cement prices actually charged are not infrequently shaded by these seven respondents and their competitors below current price quotations. There is direct evidence which the Commission failed to report, that these respondents and their competitors have sold cement at prices below openly quoted prices and that this practice has been particularly severe in the large metropolitan areas and on the big jobs. The extent to which these seven respondents have offered prices below currently quoted prices has varied with conditions of demand and was greater at some times than at other times when they had all the business they could handle without having to

[4] Fdgs. Pars. Eight (i), Nine (b), R. 16013-14, 16023-27.

[5] Fdgs. Pars. Nine (a), Twenty-four (d), R. 16023, 16129-30.

resort to price concessions.[6] The Commission seeks to avoid the force of this clear and uncontradicted evidence by constant reference in the Findings to the "pricing system," and by falling back upon the shopworn contention that when there was not uniformity in price the "system" was not working.[7]

To the extent that published prices of cement have been uniform the factors that bring about that substantial uniformity at any given time and place are shown to be the following:

First, cement is a thoroughly standardized product. *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. at p. 591. The Supreme Court recognized that "There is a strong tendency to uniformity of price" in the sale of a standardized commodity. *Sugar Institute Inc.* v. *United States*, 297 U. S. 553 (1936), at p. 600. It is undisputed that no buyer will pay a penny more for one brand of cement than he will for another. It is so alleged in the complaint and the Commission has so found.[8]

Second, as the Commission has found, cement manufacturers keep constantly informed of changes in competitors' prices "through common customers and through salesmen in the field."[9] It is *conceded* that for many years the major portion of the cement manufacturer's sales have been made to dealers and that dealers are well informed

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[6] App. A, Part XVII, pp. 2694-95, 2779-80, 2829-30.

[7] Fdgs. Pars. Six (c), Twelve (a), Twenty-four (d), R. 15987-88.

[8] App. A, Part XVII, pp. 2679-81. Complaint, Count II, Par. Eight, R. 241. Fdgs. Par. Nine (a), R. 16023.

[9] Fdgs. Par. Nine (e), R. 16028-29.

buyers and cement prices are a matter of common knowledge in the trade.[10]

Third, as found by the Supreme Court in the *Cement Manufacturers* case, changes in prices are usually met promptly by competing manufacturers. This Court said:

> "Any changes in quotation of price to dealers, promptly becomes well-known in the trade through reports of salemen, agents, and dealers of various manufacturers * * * uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers." (p. 605)

It is undisputed that every cement manufacturer must meet the lowest price at which any competitor has offered to sell cement at any given destination or forego the business, because no buyer will pay a penny more for one brand of cement than he will for another.[11] Likewise every manufacturer knows from experience that any reduction in his published prices is certain to be met promptly by competitors and consequently, the quoting of a lower price ordinarily results in no material increase in sales.[12] Even in the case of sales below published quotations, responsible executives of a number of these seven respondents testified that it was their experience that competitors met such lower prices as soon as they learned of them which tended to result in general price decreases with no permanent shift

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[10] Fdgs. Par. Seventeen, R. 16089-99. App. A, Part I, p. 36; Part XVII, pp. 2689, 2696, 2759-60, 2871-72.

[11] App. A, Part XVII, pp. 2679-81, 2821.

[12] App. A, Part XVII, pp. 2765-67, 2679-81, 2823-25.

in any company's customers and that this has operated to discourage price cutting.[13]

Fourth, the concensus of the testimony of both Commission's and respondents' economists who testified during the hearings below is that in an industry such as the cement industry, where well-informed buyers are purchasing what they consider to be a homogeneous commodity at delivered prices and where the sellers are well-informed as to market prices, effective competition tends to produce a uniform price at a particular time.[14] Like views were expressed by economists and accepted by this Court in the *Cement Manufacturers* case, 268 U. S. at pp. 605-6. The Commission's *conclusion*—that this recognized principle of economics does not serve to explain the uniformity of price of cement[15]—is, therefore, capricious and contrary to the evidence viewed in the light of judicial authority.

Finally, the Clayton Act, as amended, is an influential cause of price uniformity. Under Section 2(b) a manufacturer is permitted to sell at a lower delivered price "to meet an equally low price of a competitor." But it is not permitted to undersell the competitor's price at such point unless it is prepared to reduce correspondingly its delivered price at every other competitive point where it is higher.

The Commission contends that the meeting of competitor's prices constitutes the absence of free competition[16] and counsel used the epithet "matching prices" in

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[13] App. A, Part XVII, pp. 2694-95, 2779-80, 2829-30.

[14] R. 5194, 5219, 5234, 5239, 15080.

[15] Fdgs. Par. Twenty-two (c), R. 16123-24.

[16] Fdgs. Par. Twenty-four (d), R. 16129-30.

order to give this a suggestion of collusion. The Court should not be misled by the sinister meanings which the Commission and its counsel have attempted to ascribe to the practices of the various respondents by the constant and repetitious use of such phrases as "pricing system", "basing points", and the like.

Uniformity of delivered prices is no more inherent in what the Commission repeatedly calls the multiple basing-point method than it is in any other method of open price quotation but rather it exists irrespective of the pricing method used. But even if we assume, *arguendo*, that the effect of the use of that method, to the extent that any of these seven respondents uses it, is to bring about uniformity of price, nevertheless, no adverse inference may be drawn therefrom. The Courts have consistently held that price uniformity is illegal only when it is brought about and maintained by agreement or collusion and they have likewise held that in the absence of agreement or collusion no inference of illegality or illegal conduct may be inferred from price uniformity. *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588 at pp. 605-06; *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563, 567-68 (1925); *United States* v. *International Harvester Company*, 274 U. S. 693, 708 (1927); *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288, 316 (1931). The Commission may be of the contrary view and may see in such a situation evidence of agreement or conspiracy but their views must yield to those of the courts.

Moreover, uniformity of prices is not only consistent with competition but it should in the case of an industry such as the cement industry be regarded as indicative of competition. As was pointed out by the Court in the

Standard Oil case, *supra,* at p. 316, and eminent economists have testified,[17] uniform prices in the case of a standardized commodity are the natural consequence of the operation of economic factors in a competitive system. And, as we have seen (*supra,* p. 15), the operation of those factors has been confirmed and reinforced by the prohibitions against price discrimination contained in the Clayton Act, as amended.

b. Prices on Public Bidding

The Commission makes a great deal of its case depend upon the alleged identity of prices on public bidding which it purports to find is the result of employment of "what is known as a multiple basing-point system of pricing".[18] As a matter of fact the alleged high degree of identity has never existed with respect to the bids of these seven respondents. In the marketing territory of these respondents identical bids on public lettings are the exception and non-identical bids the general rule and these seven respondents were entitled to a finding based upon this undisputed and important evidence. The documentary evidence and the uncontradicted testimony of Government purchasing officials shows that the bids submitted by these seven respondents, with a few minor exceptions since the Code period, were *not* identical and that as to those exceptions the prices quoted were the current market prices which the respective bidders were quoting to other customers irrespective of whether they reflected any basing point, zone, "arbitrary",

[17] For example, Commission's economist, Dr. Viner, testified "I could not explain continuance of two different prices in the same market if there was real competition." Cit., *supra,* fn. 14.

[18] Fdgs. Par. Eight (i), Nine (b), R. 16013-14, 16023-27.

or other method of pricing.[19] The Findings seek to avoid the effect of this important evidence, first by ignoring it and second, by constantly referring to the "system of pricing".

No claim is made by the Commission that the respondents agreed upon the prices to be bid at any time and there is no finding of agreement. As counsel for the Commission put it, "The Commission has simply contended that they use a basing-point system simultaneously and cooperatively in making up their bids, and that the result of the common use of that system is identical bids * * *."[20] That contention, as we have seen, is carried into the Commission's Findings.[21] So that on the one hand the Commission insists that the prices bid have been "formula" prices and on the other hand it is charged that the use of such a method of pricing results, and has resulted, in identical prices.[22] The evidence is that the prices quoted by these seven respondents, as shown by the abstracts of bids and by the bids themselves, were in general *not* identical[23] and the Commission find themselves on the horns of a dilemma, which undoubtedly accounts for their failure to make any finding with respect to any of these seven respondents.

And what is more, the bids introduced in evidence by the Commission were the result of highly selective samplings. When these seven respondents sought to correct the lop-sided picture of prices quoted on sealed bids given by Commission's counsel the Trial Examiner rejected the

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[19] App. A, Part XVII, pp. 2698-702, 2724-26, 2784-90, 2833-41.

[20] R. 7148, 7971.

[21] Fdgs. Par. Eight (i), R. Vol. 24, pp. 16013-14.

[22] Fdgs. Par. Twenty-four (d), R. Vol. 24, pp. 16129-30.

[23] Cit., *supra* (fn. 19).

offer of proof (including documentary evidence of typical f.o.b. mill bids showing that all prices were non-identical both at destination and at mill) by which the Commission's evidence would have been put in its proper perspective.[24] But even with the record in the state it is, the Commission could not find, and it did not find, that any of these seven respondents adhered to its commercial prices with any degree of regularity or that identical prices were not the exception on such biddings.[25]

The evidence as to the bidding practices of these seven respondents leads to but one conclusion and that is that they either did not use the alleged method of pricing or, if they did use it, such use has not had the asserted effect upon prices. In either event, it is obvious that none of these seven respondents has participated in the nationwide conspiracy as charged assuming that such conspiracy ever had any existence, which is denied.

The Commission failed to report that none of these seven respondents has ever corrected or withdrawn any bid submitted on a public letting or ever attempted to do so.[26] Paragraph Nine (d) of the Findings is, therefore, erroneous and not supported by evidence as to any of these seven respondents. The Commission, likewise, failed to report that there is uncontradicted testimony by responsible executives of these respondents and their competitors denying that they ever agreed with any competitor to quote the same price for cement or to employ any particular method

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[24] Statement of Points No. 39, R. 16280-84. Motion for Leave to Adduce Additional Evidence, Subj. II, R. 16570-73.

[25] Cf. Findgs. Par. Nine (b), R. 16023-27.

[26] App. A, Part XVII, p. 2704.

of pricing.[27] These witnesses were in a position to know whether in fact any agreement had been reached for concerted action and, therefore, it was error for the Commission to ignore such evidence. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 225 (1939).

For the foregoing reasons we contend that no agreement or conspiracy has been proved or shown in the evidence with respect to the uniformity of prices or price quotations of any of these seven respondents and there is no support therein for any inference of agreement or conspiracy. Accordingly, the Commission's charge is not supported by substantial evidence and there is nothing upon which to predicate any Findings against any of these seven respondents.

3. *No Agreement or Conspiracy Has Been Proved or Shown With Respect to the Use of "What is Known as a Multiple Basing-Point System of Pricing" In So Far as Anything in the Nature of a "Basing-Point" Method is Shown to be Used by Any of These Seven Respondents.*

The Charge. The complaint alleges that respondents cooperatively employ "what is known as a multiple basing-point system of pricing" and that there is a governing basing point for any destination.[1]

The Findings. The Commission has found that "respondents use a multiple basing-point system. The formula used to make this system operative is that the delivered price at any location shall be the lowest combination of

[27] App. A, Part XVII, pp. 2695, 2704, 2768, 2791-92, 2831, 2851.

[1] Complaint, Count I, Pars. Five (a), Seven (b) (c), R. 54, 117, 128.

base price plus all-rail freight".[2] The Commission has also found that "The record does not definitely show the date and manner of the extension of the multiple basing-point delivered-price system to California • • • but it was in existence there during the first World War" • • • "In southern California the basing-point system of pricing is modified by an elaborate system of zone prices in certain areas".[3] These Findings are erroneous and inaccurate and are not supported by the evidence.

THE FACTS AS TO THE NORTHERN CALIFORNIA MILLS:

The Proof. The undisputed evidence shows that in 1918 the War Industries Board made a careful survey of the situation in California and established two basing points in California: the Riverside mill at Crestmore as the basing point for southern California, and the Santa Cruz mill at Davenport as the basing point for northern California.[4] Later, in response to increasing demand, new cement mills were built in northern California, namely, the Pacific mill at Redwood Harbor in 1924, the Calaveras mill at Kentucky House in 1926 and the Yosemite mill at Merced in 1927. The establishment of each new mill successively reduced the volume of shipments and the marketing areas of the existing mills.[5] In August 1929 a change in marketing conditions occurred as a result of new price quotations issued by *Cowell*, one of the northern California mills and a *non-respondent*, which resulted in reductions in the prices at destinations throughout northern and central California.

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[2] Fdgs. Par. Seven (a), R. 15988.

[3] Fdgs. Par. Seven (m), R. 16000.

[4] App. A, Part XVII, pp. 2682-83, 2686, 2815-16.

[5] App. A, Part XVII, pp. 2678, 2686, 2737-38.

All of the new quotations reflected a price base of $2.45 per barrel, gross ($1.90 stripped) at each of the northern California mills *and the actual freight rate from each mill to each destination in its marketing area.*[6]

Now let us see what the Commission found at a time when it had no motive to fit all the respondents herein to the Procrustean bed. The Commission in its report to the Senate in 1933 (Sen. Doc. No. 71, 73rd Cong. 1st Session) found that:

> "In northern California in the territory adjacent to San Francisco the following five cement manufacturing companies are operating, each with office in San Francisco: The Calaveras Cement Co., with a mill at San Andreas; the Cowell Portland Cement Co., with a mill at Cowell; the Pacific Portland Cement Co., with mills at Redwood Harbor and San Juan Bautista; Santa Cruz Portland Cement Co., with a mill at Davenport; Yosemite Portland Cement Corporation, with a mill at Merced, Calif. *These companies have six cement mills and constitute a compact group with a logical shipping territory covering northern California and northwestern Nevada and southern Oregon.* * * * San Juan Bautista mill, of the Pacific Portland Cement Co., has not operated since 1930. * * *"
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> * * *
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> "The cement mill of the Santa Cruz Co. at Davenport, 92 miles south of San Francisco, was a basing point by all of the northern California mills until August 12, 1929. * * * On August 12, 1929, the Henry Cowell Lime & Cement Co. inaugurated the practice of basing prices on the mill nearest destination and issued a price list showing destination

[6] App. A, Part XVII, pp. 2684-87.

prices in a large number of towns in California, Nevada, and Oregon, based on $2.45 per barrel at each of the northern California mills, plus freight to destination. All of the other northern California manufacturers at once adopted the same policy. *This was an important change in the method of establishing destination prices and caused price reductions at all points in the northern California territory except those where the freight rate from Davenport controlled. This ended the basing-point method of determining delivered prices as it is understood and applied in the eastern part of the United States and substituted therefor the price-list method. It also resulted in the establishment of a uniform mill price for all mills, for use in computing price for all delivery points not covered by the published price lists.*" (Italics added.) (Report on Cement Industry, pp. 114, 127.)

The Commission in the above report clearly recognized the essential differences between the pricing methods of Calaveras, Pacific, Santa Cruz and Yosemite, and the basing point method employed in the East. Obviously, these divergent facts neither indicate, nor permit the inference, that any of the four Northern California respondents herein has been a party to a nationwide conspiracy to maintain "what is known as a multiple basing point system of pricing" as charged in the complaint, or at all. Moreover, there is no complaint here and none could be fairly made about "cross-hauling" or "phantom freight" or "reciprocal waiver of advantages". Any such complaint would be an obvious absurdity since the Commission expressly reported that the mills of the four Northern California petitioners "constitute a compact group with a logical shipping territory * * * ".

THE FACTS AS TO SOUTHWESTERN (VICTORVILLE):

The undisputed evidence is that no basing points have been in use in southern California since 1927, that for over ten years prior to the complaint cement in southern California has been sold at blanket or "zone" prices for various trade areas without regard to differences in freight rates from the respective mills and that the boundaries of the said areas, the prices established, and the changes therein have been determined independently by the respective manufacturers to meet competitive conditions from time to time.[1]

As shown by documentary evidence and the uncontradicted testimony of its responsible executives, Southwestern's (Victorville) prices, and any changes therein, are determined without reference to any price bases or freight rates. Victorville cement is sold at price listed destination prices based upon information obtained independently by Southwestern from its customers and its salesmen as to the current market prices at destination and this includes the parts of southwestern Arizona and southern Nevada to which Victorville makes shipments. The record discloses, further, that Southwestern has varied its sales and pricing procedure to meet varying conditions of competition as they were found to exist, thus evidencing independence of action in meeting competitive conditions. There is no evidence of any agreement on the part of Southwestern or any of its competitors to adhere to any price listed quotations and the Commission made no finding of any agreement.[2] Southwestern's practice of broadcasting open

[1] App. A, Part XVII, pp. 2814-20.

[2] App. A, Part XVII, pp. 2818-29, 2851.

and announced prices is in accordance with the law as laid down by the Supreme Court in the *Sugar Institute* case, 297 U. S. at p. 585.

With these facts in mind let us see what the Commission had to say prior to the complaint about pricing methods in Southwestern's marketing area. In its report to the Senate in 1933, *supra*, the Commission stated as to the Southern California mills:

> "*Basing points.*—The principal basing point used by southern California mills was Crestmore, the location of the Riverside Cement Co.'s mill, when basing points were used in determining delivered prices. *Fixing prices by the basing point method has been abandoned and prices are now fixed by price lists* circulated among manufacturers and dealers showing the price to dealers at all delivery points." (Italics added.) (Report on Cement Industry, p. 115.)

The record discloses no material changes in the pricing or sales procedure followed by Southwestern's Victorville mill since 1933 or the issuance of the above report, and the pricing and sales procedure under condemnation by the Commission in the present proceeding is no different basically from the pricing and sales procedure followed in 1933, which led the Commission to conclude that the use of the basing point method by southern California mills had been abandoned. And yet the Commission in this proceeding purported to find that in southern California the basing point system of pricing was "modified". In the light of the above facts it most assuredly cannot be said that this finding is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion."[3] Where are the "governing" basing-points for the destinations in this entire marketing area? Where are the "indispensable" freight rate books? Where is the evidence of "formula" quoting? The truth is that the pricing methods of Southwestern (Victorville) are the direct opposite of the "system" charged in the complaint and the Commission obviously has tried to straddle the facts.

THE FACTS AS TO SPOKANE[1] AND OREGON:

The undisputed evidence is that cement has been sold at delivered prices in Spokane's marketing territory since prior to 1912. The testimony of dealers who purchased cement in those days is that they always requested quotations f.o.b. destination because they wanted to know what cement would cost them at the place of use.[2] When Spokane's predecessor started shipping cement from its mill at Irvin, Washington in 1913 its practice was to meet the lowest quotations it found in the field. Since 1915 Irvin has been a base mill.[3]

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[3] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229 (1938).

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[1] No evidence was introduced by the Commission concerning the respondent Spokane. All references to the record relate to evidence affecting the *non-respondent*, the International Portland Cement Company, Ltd., a separate and distinct company which is no longer in existence. Respondent Spokane first became engaged in the production and sale of cement on May 5, 1937 when it purchased the mill of the said *non-respondent*, International Portland Cement Company. Fdgs. Par. One (31). R. 15975.

See also, *infra*, pp. 70-71 for separate defense of Spokane.

[2] App. A, Part XVII, pp. 2758, 2778.

[3] App. A, Part XVII, pp. 2760, 2764, 2776.

Oregon's two mills have been base mills since their inception. Oregon's prices are arrived at by adding to its price base the actual freight from shipping point to point of delivery. Where shipments are made into a market in which a lower price prevails freight is absorbed to meet the competition.[4] Oregon has also sold f.o.b. mill and f.o.b. warehouse to any customer who desires it at a flat mill price without regard to the destination.[5] The marketing territories of Spokane and Oregon have shrunken considerably as a result of (a) construction of new mills in Idaho and western Washington and (b) reductions in the price bases of their own and competitor's mills. The Spokane and Oregon mills were forced to withdraw solicitation in the territory adjacent to the new mills because they could no longer meet the competition at those points without taking a severe loss on such business transacted. Both Spokane and Oregon have reduced their prices to meet any reductions in price by neighboring mills in the territory customarily served because no buyer will pay a penny more for one brand of cement than he will for another.[6] The Commission does not seriously contend that these companies were conspiring with the new-comers or with existing competitors who established lower price bases.

The Commission has made no finding of any agreement among the respondents, through the Institute or otherwise, upon basing-points or prices or price leadership.[7] Furthermore, there is uncontradicted testimony of responsible executives of these respondents and their competitors denying

[4] App. A, Part XVII, pp. 2763, 2775.

[5] App. A, Part XVII, pp. 2794, 2798-99.

[6] App. A, Part XVII, pp. 2765, 2775-76.

[7] Fdgs. Pars. Seven (b), Nine (e), R. 15988-89, 16028-29.

that they ever had any agreement with any competitor with respect to the method of pricing used by their companies.[8] What significance, then, should be given to the manner in which these seven respondents use the "basing-point method," to the extent that any of them uses it? Certainly it is not indicative of conspiracy not otherwise proven, and the courts have never held that it is. On the contrary, the courts have invariably declined to infer the existence of concert of action from mere evidence of price similarity where competitors employing such a pricing method have done so freely and independently, which is what the Commission has found here. *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, at p. 598; *Maple Flooring Manufacturers Ass'n* v. *United States*, 268 U. S. 563, at p. 568 and, as is shown elsewhere (see Point Two, *infra*, p. 70) there is no generally accepted principle of economics that compels such a conclusion.

So that there is no proof of agreement or conspiracy and no support for any inference thereof in the evidence with respect to the methods of pricing or price quotation of these seven respondents and, furthermore, such methods are entirely in consonance with the provisions of the Clayton Act, as amended, which effectively negatives any such inference.

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[8] App. A, Part XVII, pp. 2768-69.

4. *None of These Seven Respondents Has Been a Party to Any of the Other Alleged Cooperative Acts and Practices Through Which the Nationwide Conspiracy is Said to Have Been Carried On.*

a. The Alleged Use of Freight Rate Books.

The Charge. The Commission's thesis is that all respondents in this proceeding have conspired to employ certain freight rate books prepared and distributed by The Cement Institute in conjunction with certain "governing" basing points and by this means, it is alleged, the respondents are enabled to sell at identical prices for every destination in the United States.[1]

The Findings. The Commission has found that the Cement Institute never published any freight rate books for any of the marketing territory in which these seven respondents do business.[2] The Commission has also found that there is no agreement between any respondents upon basing points or upon base prices or changes therein.[3]

The Proof. The undisputed evidence is that none of these seven respondents has ever received or used any freight rate books. Any unfavorable inference that the Commission might draw from the use of the Cement Institute freight rate books could have no application to any of these seven respondents.[4] Cf. *J. B. Lippincott Co.* v. *Federal Trade Commission*, 137 F. (2d) 490, 494-95 (1943);

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[1] Complaint, Count I, Pars. Five (b), Seven (a), R. 54-55, 91-93.

[2] Fdgs. Par. Eight (c), R. 16007-08.

[3] Fdgs. Pars. Seven (b), Nine (e), R. 15988-89, 16038-29.

[4] App. A, Part XVII, pp. 2690, 2742, 2769, 2771, 2816-17, 2851.

see *Phelps Dodge Refining Co.* v. *Federal Trade Commission*, 139 F. (2d) 393, 396 (1943).

Thus, the freight rate service, the alleged *sine qua non* of identical delivered prices,[5] is missing here entirely. Likewise, the alleged agreement to use certain governing basing-points is non-existent.[6] According to the Findings as well as the proof, the twin props of the Commission's charge of conspiracy have fallen and its case against these seven respondents has collapsed.

b. The Alleged Use of Cooperative Measures to Prevent Trucking.[1]

The Charge. The complaint states that respondents have used concerted efforts to charge customers 15¢ per barrel more for delivery to trucks and have attempted cooperatively to forbid loading of customers trucks altogether, and that this has prevented savings in cost to consumers.[2]

The Findings. The Commission has made no findings relating to any of these seven respondents.[3] As we understand it, the Commission does not contend that the evidence introduced with respect to the alleged conspiracy to eliminate trucking refers in any way to these seven respondents, who first became members of The Cement Institute in 1933, or to any of the marketing areas in which they do

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[5] Fdgs. Pars. Eight (a), Nine (a), R. 16006, 16023.

[6] App. A, Part XVII, pp. 2695, 2767-68, 2814-17, 2831.

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[1] Statement of Points Nos. 21, 40 (c), 44, R. 16261, 16285-86, 16288-89.

[2] Complaint, Count I, Par. Seven (b), R. 117.

[3] Cf. Fdgs. Par. Eleven.

business.[4] Nevertheless, the evidence concerning the practices of these seven respondents with respect to trucking is as set forth hereunder.

The Proof. The undisputed evidence shows that: *First,* there is little demand for delivery to customers' trucks at the mills of these seven respondents. Practically all commercial customers prefer destination delivery[5]; *Second,* delivery to customers' trucks is and has been consistently available at the mills and warehouses of these seven respondents at all times in response to such slight demand as there is. There is no evidence of any refusal to load customers' trucks[6]; *Third,* none of these seven respondents charges any premium on sales to customers' trucks (except that Oregon at one of its mills, but not at the other, charges a service charge of 15¢ for loading small retail lots only), and none of the northern California companies has ever charged 15¢ or any premium for loading customers' trucks.[7] This evidence clearly indicates that none of these seven respondents has used any concerted efforts to prevent trucking by customers and this completely overcomes the Commission's charge.

The record shows that until 1935 Spokane charged a service charge in varying amounts for loading trucks at its mill in eastern Washington but there is no evidence of

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[4] Counsel for the Commission *conceded* that the only charge concerning a conspiracy or agreement to eliminate trucking relates to a purported conspiracy through the Cement Institute in 1931 and 1932 (R. 12458).

[5] App. A, Part XVII, pp. 2679, 2727, 2794, 2845, 2855.

[6] App. A, Part XVII, pp. 2727-28, 2800, 2847.

[7] App. A, Part XVII, pp. 2729-30, 2794-95, 2798-99, 2846.

any concert of action and the Commission did not find any.[8] There is also evidence that on some occasions prior to the Code period Southwestern charged 10¢ per barrel on truck pick-ups at its mill in southern California in order to discourage sporadic buyers who trucked cement into the sales territory of its established dealers. This evidence shows that the action was taken individually by Southwestern for the purpose of protecting its dealers.[9] The Commission has yet to point out in this evidence any proof of participation in the alleged conspiracy or any illegality. *United States* v. *Colgate & Company*, 250 U. S. 300, 307 (1919). Here, again, the Commission erred in failing to report that there is uncontradicted testimony of responsible executives of these respondents and their competitors expressly denying any understanding or agreements with any competitor upon trucking policies or practices.[10] *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, at p. 225.

The foregoing proof conclusively indicates that there is nothing in the practices of these seven respondents with respect to trucking, either before or after they became members of the Cement Institute, that reflects any cooperative activities or warrants any inference of combination. Certainly, there is nothing here that has any bearing on the charge that the seventy-five respondents have a nationwide conspiracy to employ "what is known as a multiple basing-point system of pricing." As we have shown (see Point Two, *supra*, pp. 11, *et seq.*), the pricing methods of some of these seven respondents are the antithesis of the alleged "pricing system" which is further convincing evidence, if

[8] App. A, Part XVII, p. 2795.

[9] App. A, Part XVII, pp. 2816-19, 2847, 2874, 2897.

[10] App. A, Part XVII, pp. 2695, 2800, 2851.

further evidence were needed, that none of these seven respondents has been a party to the alleged nationwide conspiracy, assuming that such conspiracy ever existed, which we deny. It is clear, therefore, that there is utterly no foundation to the Commission's charge and that here, as elsewhere, there is no evidence upon which to base any Findings against any of these seven respondents.

c. The Alleged Use of Cooperative Measures to Prevent Diversions

The Charge. The complaint charges that "Respondents have taken cooperative measures by the use of provisions in their contract forms in order to eliminate diversions in transit."[1]

The Findings. Without citing any evidence affecting any of these seven respondents the Commission purported to find that "respondents * * * undertook, by means of understandings and agreements, to prevent purchasers making diversions in transit",[2] and that in order to prevent diversions of shipments "after the issuance of the complaint * * * the corporate respondents generally began prepaying the freight charges on all shipments of cement."[3] Notwithstanding the innuendo that they are of general application there is not a particle of evidence to support these Findings and the related Findings as to any of these seven respondents and the Findings are, therefore, all legally improper and invalid. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193, at p. 201.

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[1] Complaint, Count I, Par. Seven (c), R. 128.

[2] Fdgs. Par. Twelve (a), R. 16055.

[3] Fdgs. Pars. Twelve (e), Twenty-four (c), R. 16059, 16128-29.

The Proof. The record is devoid of evidence that any of these seven respondents or any representative thereof ever used or agreed to use any provisions in its contract forms in order to prevent diversions, or ever used or agreed to use any bill of lading stamp prohibiting diversions, or ever took cooperative or any measures to prevent diversions. The record is silent as to whether they or any of them had any policy respecting diversions of cement shipments in transit, either before or after The Cement Institute was organized.[4] The undisputed evidence is that the Code of Ethics of the Cement Institute was cancelled before any of these seven respondents became members, none of them ever signed the Code of Ethics or ever used it or agreed to use it, and none of them ever used or agreed to use the so-called "compendium."[5] The Commission's failure to report this material evidence renders the Findings defective. *Saginaw Broadcasting Company* v. *F.C.C.*, 96 F. 2d 554 at p. 563.

Furthermore, there is no evidence whatsoever respecting prepayment of freight charges by any of these seven respondents either before or after the issuance of the complaint, and no evidence of any activities or policy with respect thereto at any time. The Commission *conceded* that there is no issue as to prepayment of freight.[6] Why, then, was this matter injected into the Commission's already rambling and prolix Findings?

Coming now to the actual issue, as to whether there is any evidence of a nationwide conspiracy to employ and

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[4] App. A, Part XVII, p. 2735, 2803, 2851, 2856.

[5] App. A, Part XVII, pp. 2740, 2749, 2804-05, 2810, 2856.

[6] Answer of Commission in Opposition to Motion for Leave to Adduce Additional Evidence, Subject V, R. 16670.

maintain "what is known as a multiple basing-point system of pricing", it is perfectly obvious that there is a total failure of proof here as elsewhere, and nothing to support any Findings against any of these seven respondents. Paragraphs Seven (o) through (q), Twelve (a) through (e), and Twenty-four (c) of the Findings must, accordingly, be disregarded and set aside in their entirety.

d. The Alleged Refusal to Quote F.O.B. Mill Prices to the Government.[1]

The Charge. The complaint charges that "Respondents have thwarted the efforts of Government officials to secure f.o.b. mill prices on cement, both before and during the period of national emergency," and that this has deprived the Government of the benefit of land grant rates and has required Government agencies to purchase cement at higher prices.[2]

The Findings. The equivocal and misleading character of the Commission's Findings is illustrated in the purported findings on this subject. There is no finding that any of these respondents refused to sell cement at f.o.b. mill prices and no finding of any agreement among any of the respondents. The Commission has found merely that "Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price." For the evidence as to the reasons for this, which the Commission omitted to find, see Point II, *supra*, pp. 9-10. The Findings then refer to "certain occurrences with respect to the NRA Code" to illustrate respondents supposed "re-

[1] Statement of Points Nos. 17 (aa)-(cc), R. 16253-54.

[2] Complaint, Count I, Pars. Seven (d), Eight (i), R. 133, 188.

sistance" to selling f.o.b. mill.[3] Here, again, the Findings misrepresent the evidence and are erroneous and untrue.

The Proof. The documentary evidence and the testimony of Government witnesses show that each of these seven respondents has consistently bid f.o.b. mill for shipment on Government bill of lading whenever the Government asked for such bids. The number of barrels for which bids were invited in different periods, the types of invitations issued and the extent of compliance by these respondents and other Pacific coast companies in submitting bids is shown concisely in the Recapitulation which appears in Appendix A.[4] The record shows compliance with Government invitations by Pacific Coast companies including one or more of these seven respondents as follows: on *all* requests for f.o.b. mill bids during the Pre-Code period, totalling 390,000 bbls. of cement[5]; on a total of 2,116,000 bbls. of cement during the Code period, covering *all* invitations, requesting f.o.b. mill bids except one letting of 10,000 bbls., as to which compliance was disputed[6]; on *all* requests during the Post-Code period, totalling 7,074,500 bbls. of cement.[7] The Commission, characteristically, ignored all of this evidence in the Findings.

Furthermore, these seven respondents submitted f.o.b. mill bids on scores of other invitations, documentary evidence of which was rejected by the Trial Examiner and which respondents moved the lower Court for leave to ad-

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[3] Fdgs. Par. Seven (a) (r), 15988, 16004-06.

[4] App. A, Part XVII, pp. 2834-36.

[5] App. A, Part XVII, pp. 2698, 2784-87.

[6] App. A, Part XVII, pp. 2716, 2720, 2723-24.

[7] App. A, Part XVII, pp. 2698-703, 2724-26, 2787-91, 2833, 2837-41.

duce. Respondents' offer of proof stated that the f.o.b. mill bids in question were made without any reference to control clauses or destination costs.[8]

Nowhere in this vast record is there any evidence that any of these seven respondents ever declined to bid f.o.b. mill when the Government asked for such bids and there is express testimony to the contrary by the Commission's own witnesses.[9] Commission's witness Taylor, who was in charge of cement purchasing for the U. S. Bureau of Reclamation, testified that during the Pre-Code period out of 15 different sets of bids 14 of them were f.o.b. mill bids.[10] Counsel for the Commission *conceded* that he would accept Taylor's statement.[11] Concerning the period *since the Code*, Taylor, *supra*, testified:

> *By Mr. Wooden*:
>
> "Q. • • • What has been the situation with regard to getting f.o.b. mill bids since the Code? A. Well, we asked for bids f.o.b. shipping point and/or destination. We have received bids both ways." (R. Vol. 2, p. 456)

Similarly, Commission's witness Peoples, who was in charge of purchasing for the U. S. Procurement Division, testified with respect to all these seven respondents that "*we have been able to obtain competition on the basis of f.o.b. mill prices*".[12] This evidence does not, and cannot, indicate

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[8] Notice and Motion for Leave to Adduce Additional Evidence, R. 16551, Statement of Points No. 39, R. 16280-84.

[9] App. A, Part XVII, pp. 2698, 2784, 2787.

[10] R. 455-56.

[11] R. 6475.

[12] App. A, Part XVII, p. 2788.

that any of these seven respondents had a policy against selling f.o.b. mill. Where, then, is the claimed "resistance to selling f.o.b. mill"?[13] Where is the nationwide conspiracy to sell only at delivered prices pursuant to "what is known as a multiple basing-point system of pricing"? Here, as elsewhere, there is no evidence of it.

Faced with such evidence counsel for the Commission attempted to shrug it off as of little importance. The brief before the Commission in support of the complaint even seeks to discount the testimony of Government officials who were called as Commission's witnesses. In a desperate effort to preserve a mere suspicion counsel suggested that after all it is doubtful whether any of these bids is a "genuine" f.o.b. mill bid. And without citing any proposition of law or authority whatsoever the brief adds that "every doubt is to be resolved against respondents."[14] We contend that that position, which regrettably has found expression in the Commission's Findings,[15] is untenable and that the Finding is inaccurate and erroneous and not supported by evidence as to these seven respondents.

In the first place, it is undisputed that even the Government, when it purchases f.o.b. mill, makes the award always on the basis of the lowest laid-down delivered cost at the point of use.[16]

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[13] Fdgs. Par. Seven (r), R. 16004.

[14] "* * * Neither experienced government purchasing officials, counsel for respondents, nor counsel for the Commission are in a position to ascertain whether that is the fact from a mere inspection of an f.o.b. mill bid which a given bidder may label as an f.o.b. mill bid." (Commission's Reply Brief in lower Court, p. 43)

[15] Fdgs. Par. Eight (i), R. 16013-14.

[16] Every government purchasing agent who testified said that he always purchased on a delivered price basis whether he was quoted

Secondly, the evidence is that on sales to governmental agencies it has been the practice of these seven respondents to permit the Government to take delivery at the mill and to ship on the lowest available land grant or other special rate. We have seen hereinabove that each of these seven respondents has frequently made f.o.b. mill bids to Government agencies without taking the destination price into consideration at all and this covers the period since the Code as well as prior thereto. Since the Code period some of these seven respondents, have on occasion bid a destination price less commercial freight, as an alternative to the straight f.o.b. mill bid.[17] In either case the Government is free to compute its land grant destination cost directly from the mill, and no offer to equalize is involved. In either case the bid is a true f.o.b. mill bid.

On one letting during the Code period some of these seven respondents bid the Government destination cost, with control clause, which was on file with the Code Authority. Under this proposal the bidder offered to equalize the destination cost with the lowest and most favorable bid based upon available land grant rates. In other words the Government would take title at the mill and ship at the lowest freight rate to which it was entitled. There is no evidence to support the contention that the Government was thereby deprived of the advantage of the land grant rate. The fact is that the Government destination cost was 36¢ per barrel lower than the current commercial price at des-

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an f.o.b. mill price or a delivered price. For example, see Taylor (R. 457).

The Trial Examiner *conceded* that Government agencies "in all cases have made the awards on a destination cost basis," and rejected further evidence to the same effect. (R. 8299)

[17] App. A, Part XVII, pp. 2699, 2701-03, 2726, 2787-93, 2833-44.

tination.[18] The Commission's dubious finding concerning the use of the control clause[19] is, therefore, misleading and erroneous. Furthermore, the Commission erred in failing to report that there is uncontradicted testimony by responsible executives of these and other respondents who used this clause expressly denying that it was adopted or used as a result of any combination or agreement with competitors.[20] We have shown elsewhere that the NRA evidence has no place in this record. (See Point II, *infra*, pp. 65, *et seq.*): However, the evidence shows that even during the Code period it was the practice of a number of these seven respondents to bid a straight f.o.b. mill price or a destination price less commercial freight, thus giving an f.o.b. mill price to which the Government could, and did, add the land grant or other special rate in order to determine its delivered cost.[21]

The above gives a sufficient factual background to show that the Commission's abstract argument[22] is unavailing.

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[18] App. A, Part XVII, pp. 2721-24 (Grand Coulee Dam). See also p. 2834. For the evidence as to the origin and explanation of the Control Clause see App. A, Part IV, pp. 817-21.

[19] Fdgs. Par. Eight (k), R. 16015-16.

[20] App. A, Part IV, pp. 840-42; Part XVII, pp. 2704, 2791, 2831.

[21] App. A, Part XVII, pp. 2703, 2713, 2716, 2726, 2786, 2834, 2844.

[22] The Commission's contention that "each bidder arrived at a so-called f.o.b. mill price which was in fact a derived price" [Fdgs. Par. Eight (i)], besides being inaccurate and incorrect, runs counter to the complaint which alleges that the destination price less freight is the true price. (Complaint, Count II, Par. Six.

It is to be noted also that in the hearings counsel stated that there is no issue about the use by a respondent of delivered prices or of f.o.b. mill prices. In counsel's own words, "So far as the complaint is concerned there is no point made of whether they price f.o.b. mill or whether they price f.o.b. destination." (R. 11459).

The issue here is whether or not any of these seven respondents has deprived the Government of transportation or other benefits to which it would otherwise be entitled. We have demonstrated that they have not and no amount of speculation by the Commission, however beguiling, can supply the lack of substantial evidence to the contrary.

Finally, it is undisputed that it has been the usual practice of each of these seven respondents to quote, and they have quoted, prices substantially lower than their commercial prices when bidding on Government invitations. The Commission could not honestly find, and it did not find, that any of these seven respondents has not freely given concessions in price to Governmental agencies.[23] The Commission does not contend that these prices were "arrived at or determined under the basing point system" but rather it seeks to avoid the effect of this evidence by ignoring it completely. Nevertheless, these respondents have their rights and the Commission may not arbitrarily ignore uncontradicted evidence which is relevant and material, and, above all, important evidence. *Saginaw Broadcasting Company* v. *F. C. C.*, 96 F. 2d 554, at p. 563; *National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, 479 (1941).

From what has been said, it is manifest that there is no evidence to support the charge that these seven respondents by any means or method have deprived the Government of transportation or any benefits and the material evidence, which the Commission carefully omitted in the Findings, is all to the contrary. Having searched the record in vain for any evidence of the claimed "resistance"[24] we are forced to

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[23] App. A, Part XVII, pp. 2697, 2777, 2784, 2832.

[24] Fdgs. Par. Seven (r), R. 16004.

conclude that it exists only in the Commission's imagination. Thus, the whole of Paragraphs Seven (r), and Eight (h) through (o) of the Findings are not supported by substantial evidence and were properly set aside by the lower Court.

e. The Alleged Agreement Arbitrarily and Cooperatively to Classify Customers.

The Charge. The complaint charges that before and during the NRA period the respondents sought a Code provision which would require a division of customers into two classes, one to be sold direct and the other through the dealer, that these efforts were unsuccessful and, nonetheless, respondents *arbitrarily* and *cooperatively* made such a classification of customers.[1]

The Findings. The Findings recite excerpts from the negotiations having to do with submission and approval of the Code, including drafts of the Code and correspondence relating to conferences with dealer representatives, and conclude that "agreements between respondents and dealers were worked out with respect to classification of trade and division of business."[2] These Findings misrepresent the evidence cited and omit the material facts, and there is no evidence to support them as to any of these seven respondents. Moreover, the NRA evidence has no place in this record and the Commission erred in attaching any weight or significance to it. (See Point Two, *infra*, pp.

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[1] Complaint, Count 1, Par. Seven (e), R. 144.

[2] Fdgs. Par. Seventeen (d) (e), R. 16095.

65, *et seq.*). The Findings are, therefore, erroneous, unfounded and improper.

The Proof. The undisputed evidence as to these seven respondents which the Commission, wrongfully, failed to consider, is that:

The National Recovery Administration suspended Article XI of the Cement Code *because the cement dealers, through their Code Authority, requested it.*[3] Following the suspension of Article XI, the Code Authority ruled that a member's method of selling was not regulated.[4] Subsequently, the Code Authority for the Builders Supply Industry suggested a proposed revision of Article XI which would have provided for more sales through dealers. The cement manufacturers of California, in turn, submitted to the Code Authority a proposed revision of Article XI, which they asked be made applicable to District #11, and which would have provided that more sales should be made direct.[5] There is no evidence that any action was ever taken as a result of either proposal and a revised Article XI was never approved.[6]

It is submitted that no unbiased mind could find in this evidence an "agreement between respondents and dealers", as the Commission purported to find.

The Findings devote several pages to the marketing policies of the Lehigh company.[7] The undisputed evidence

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[3] App. A, Part XIV, pp. 2306-07.

[4] App. A, Part XVII, pp. 2888, 2894.

[5] App. A, Part XVII, pp. 2889-90.

[6] App. A, Part XVII, p. 2890. Fdgs. Par. Seventeen (d), R. 16093-96.

[7] Fdgs. Pars. Fourteen (e), Seventeen (c), R. 16070, 16091-93. App. A, Part XVII, pp. 2884-85.

is that none of these seven respondents ever adopted or followed or ever agreed to adopt or follow the Lehigh Dealer Service Plan or any of the policies referred to. There is in this evidence no proof nor anything to warrant an inference of the "concerted action by respondents" which the Commission vaguely purported to find.[8]

The Findings make extensive reference to policy announcements issued in 1935 by some manufacturers and to alleged meetings and agreements relative thereto.[9] These seven respondents are not mentioned and, apparently, the Commission does not contend that the Pacific Coast is included in the "major areas" in which the asserted practices were effective. In simple honesty the Findings should have so stated instead of employing devious phrases which leave it to inference that they are of general application. The uncontroverted facts, which the Commission failed to report, are that none of these seven respondents participated in or was represented at any of the alleged meetings and none of them issued such announcements or followed such policies. Moreover, the practices of these seven respondents differed substantially from those referred to in the Findings and varied individually, and in relation to those of competitors.[10]

The Findings refer to the alleged "division of sales to agencies of the Federal Government."[11] The undisputed evidence is that sales by these seven respondents for use on emergency relief work were customarily made through the dealer because it was the type of work which normally

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[8] Fdgs. Par. Seventeen (b), R. 16090-91.

[9] Fdgs. Par. Seventeen (e), R. 16096-98.

[10] App. A, Part XVII, pp. 2893-909.

[11] Fdgs. Par. Eighteen (a), R. 16099.

would be sold through the dealer and often required dealer service, particularly on jobs in cities and towns. Nevertheless, some sales were always made direct to the WPA, and all purchases by the U. S. Government were sold direct by some manufacturers after the suspension of Article XI.[12] There is no evidence that any of these seven respondents attended any dealers' meetings in which this subject was discussed or ever had any agreement with any competitor in regard to emergency relief purchases or the classification of business, and there is uncontradicted testimony, denying any such conferences or agreements.[13] So that there is nothing in the policies or practices of these seven respondents with respect to sales to agencies of the Federal Government that shows any concert of action or warrants any inference thereof.

The evidence as to the various policies of these seven respondents with respect to classification of dealers trade and direct sales is set out in Appendix A.[14] A comparison of these policies during and after the NRA Code period shows that to the extent that they were identical they simply reflected language in the Code which was an expression of trade practices that had developed over a period of many years based on custom and the normal function of the dealer. Far from suggesting any such conspiracy as is alleged in the complaint they clearly indicate the independence of these seven respondents in marketing practices and the fact that none of them was a party to any combined activities with respect thereto.

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[12] App. A, Part XVII, pp. 2893-96, 2898-99.

[13] App. A, Part XVII, p. 2896.

[14] Cit., *supra* (fn. 10).

Thus, there has not been shown any "arbitrary" classification of sales by any of these seven respondents, much less any agreement arbitrarily to classify such sales. And above all, it cannot reasonably be contended that there is any connection between this evidence and the alleged nationwide conspiracy to employ "what is known as a multiple basing point system of pricing". Here, again, there is a total failure of proof and nothing on which to ground any Findings against any of these seven respondents.

f. The Alleged Use of an Agreed and Arbitrary Definition of a Cement Dealer

The Charge. The complaint states that the respondents have entered into an agreement whereby they have combined to limit their sales to middlemen who fall within *an agreed* and *arbitrary* definition of a "cement dealer," except for sales to other specified classes of customers, *arbitrarily* selected.[1]

The Findings. The Commission has made no finding of agreement by or between any respondents to use an arbitrary definition or any definition of a dealer and no basic findings as to the facts on this issue at all. Instead the Commission has resorted to argumentative statements and the unfounded assertion that "respondents" entered into "agreements and understandings among themselves and with groups of dealers and dealer organizations to secure uniformity in their dealer policies; * * *" The only evidence cited or which can be cited for this ostensibly damaging finding is the alleged evidence of activities of early trade associations that existed in some parts of the country

[1] Complaint, Count I, Par. Seven (e), (f), R. 145-46, 153.

thirty years ago.[2] This so-called evidence has no place in the record in this proceeding which charges the respondents with a nationwide conspiracy to employ a multiple basing point system (see Point Two, *infra*, pp. 65, *et seq.*), and there is no support for such a finding anywhere in the evidence with respect to any of these seven respondents. And not only that but here, as elsewhere throughout the Findings, the Commission has studiously ignored the material evidence.

The Proof. It is not disputed that the earliest evidence of the use of a definition of dealer by any cement manufacturer on the Pacific Coast occurred during the NRA period. Some of these respondents, individually, adopted a definition of a dealer which was similar to the definition contained in Article XI of the Code. One of these seven respondents adopted a definition which did not require that the dealer be engaged in the building material industry. All except one or two of those who adopted a definition of a dealer discontinued its use at the end of the Code period.[3] In so far as any of these seven respondents adopted a dealer definition no adverse inference may be drawn. We have shown that the provisions of the NRA Code have no place in this record (See Point Two, *infra*, pp. 65, *et seq.*) As a matter of fact, the evidence cited shows that the Code definition had become well known to dealers and that those manufacturers who published a similar definition did so in order to gain favor with their trade.

The undisputed evidence is that in the marketing territory of these seven respondents a customer did not have to

[2] Fdgs. Par. Seventeen (a) (b), R. 16089-91.

[3] App. A, Part XVII, pp. 2876-78.

be a member of a dealer association in order to be sold as a dealer, that none of these seven respondents used any dealer association's definition of a dealer, and that each dealer was sold on his own merits.[4]

There is no evidence of any activities or understandings relating to the qualifications of any dealer or dealers and no evidence of any attempt by any manufacturer or by The Cement Institute to influence the selection of dealers in any of the marketing territory of these seven respondents. Moreover, there is uncontradicted testimony of responsible executives, which the Commission failed to report, denying any such influence and testifying to the complete independence of action of their companies in the selection of dealers at all times.[5] It is significant that the Commission made no finding that any of these seven respondents ever agreed with its competitors to limit sales to customers who meet a set definition of a dealer or that there is evidence from which an inference of such agreement is warranted.

Finally, it is difficult to see how this matter of a dealer definition in any way bears on or tends to prove the charge of a nationwide conspiracy to employ a multiple basing-point system of pricing. Here, too, the Commission has failed entirely to prove the immediate charge and it has failed to establish any connection between the evidence on this subject and the ultimate issue in this proceeding. In view of this, Paragraphs Seventeen and Eighteen of the Findings are invalid and of no effect as to any of these seven respondents.

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[4] App. A, Part XVII, pp. 2878-80.

[5] App. A, Part XVII, pp. 2879, 2893.

g. The Alleged Agreement Upon Terms of Sales and Discount.[1]

The Charge. The complaint charges that terms of sale and discounts are uniform and are the result of mutual understanding and concert of action among the respondents.[2]

The Findings: Without mentioning any of these seven respondents or specifying against which of the seventy-five respondents it was finding, the Commission purported to find that "Respondents' multiple basing-point delivered price system has been supplemented by uniformity of terms and conditions of sale brought about by collective action * * *."[3] This Finding is untrue and without any support in the evidence with respect to the terms and conditions of sale of these seven respondents. The excerpts in the Findings which purport to relate to activities of early trade associations respecting terms and conditions of sale have no place in this record.[4] (See Point II, *infra*, pp. 68, *et seq.*).

The Proof. The undisputed evidence is that from the earliest record there has been a lack of uniformity between dealer differentials and discounts on the Pacific Coast and those in other parts of the country and terms of sale and discounts have varied from time to time in different sections of the Pacific Coast and frequently in the same market.[5] The Findings devote considerable space to the action

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[1] Statement of Points No. 24, R. 16268-68.

[2] Complaint, Count I, Par. Seven (g), R. 160.

[3] Fdgs. Par. Fourteen (a), R. 16065.

[4] Fdgs. Par. Fourteen (b) (c), R. 16065-69.

[5] App. A, Part XVII, pp. 2700, 2707, 2804, 2806, 2881-84, 2897-98.

of the Lehigh company with respect to dealer differentials but wholly ignore the undisputed fact that none of these seven respondents ever adopted or followed the Lehigh Dealer Service Plan or ever agreed to do so and none of them was involved in any of the activities or marketing situations referred to.[6]

The provisions of the NRA Code relative to the terms of sale, cited and relied on in the Findings[7] have no place in this record (See Point II, *infra*, pp. 65, *et seq.*). It is undisputed that under the Code the published terms of payment and discounts were the same for a period and then a Company on the Pacific Coast filed with the Code Authority different terms of cash discount which were more favorable to the dealer and which were ultimately met by its competitors.[8]

The inclusion in the Findings of garbled excerpts from the Code of Ethics and the so-called "compendium", with the implication that The Cement Institute and its members had a part in creating or maintaining uniformity of terms and conditions of sale, is highly improper.[9] In the first place, such recitals do not constitute valid and sufficient findings of fact. *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91, 96 (1937). Secondly, there is no evidence to support such an inference as to any of these seven respondents and there is direct evidence to the contrary. The undisputed evidence is that the Code of Ethics was cancelled before any of these seven respondents becam

[6] Fdgs. Pars. Fourteen (e), Seventeen (c), R. 16070, 16091-93. App. A, Part XVII, pp. 2884-85.

[7] Fdgs. Par. Fourteen (f), R. 16070-71.

[8] App. A, Part XVII, pp. 2804, 2883.

[9] Fdgs. Par. Fourteen (d) (g), R. 16069-70, 16071.

members of The Cement Institute and none of them ever signed the Code of Ethics or ever used it or agreed to use it. Furthermore, there is no evidence that any of these seven respondents ever used the so-called "compendium" or ever agreed to follow the practices outlined therein and there is direct evidence that they did not.[10] The Commission ignored the documentary evidence and uncontradicted testimony of responsible executives of these and other respondents which shows substantial differences between their terms of sale and discounts and those of competitors.[11] We submit, therefore, that there is no proof of agreement in this evidence and no support therein for any inference of participation by any of these seven respondents in the alleged nationwide conspiracy, assuming that such conspiracy ever existed, which we deny.

Such uniformity as has existed in the terms of sale of these seven respondents has been brought about by competition. It is undisputed that terms of sale in a given market area tend to become substantially the same at any given time and under the same circumstances due to the pressure of the buyer. When one manufacturer openly changes his terms of sale to the advantage of the buyer other manufacturers competing with him for the same customers generally meet those terms or suffer a loss of trade.[12] This was recognized by the Supreme Court in the *Cement Manufacturers* case, *supra*, at p. 605, and it is *conceded* by the Commission.[13]

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[10] App. A, Part XVII, pp. 2740, 2804-05, 2810, 2856.

[11] App. A, Part XVII, pp. 2700, 2707, 2711-12, 2772, 2804-07, 2881-82.

[12] App. A, Part XVII, pp. 2679, 2804-05.

[13] Fdgs. Par. Fourteen (a) (d), R. 16065, 16069-70.

The Findings failed to report that there is uncontradicted testimony of responsible executives denying the existence of any agreements or understandings between these respondents and their competitors with respect to terms of sale or discounts.[14]

From the above proof it is clear that none of these seven respondents was or could have been a party to the asserted maintenance of uniformity of terms of sale or discounts and the variances in their practices, particularly since the Code period, is significant of their independence of action. Moreover, the Commission has failed to show any connection between this evidence and the charge that the respondents have a nationwide conspiracy to employ a multiple basing-point system of pricing.

Thus, the Commission has failed to make Findings as to the material facts, as shown by the undisputed evidence. Furthermore, it has failed to make basic Findings related to the ultimate fact in issue. All of Paragraphs Fourteen (a) through (f), and Seventeen (c) are, therefore, invalid and of no effect against any of these seven respondents and must be disregarded in determining whether there is any basis for the order. *Saginaw Broadcasting Company* v. *F. C. C.*, 96 F. 2d 554, at p. 563; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, at p. 479.

h. The Alleged Agreement to Sell at Uniform Prices Under the Price of Imported Cement.

The Charge. The complaint charges that in certain seaboard centers respondents have made concerted and uni-

[14] App. A, Part XVII, pp. 2805-07, 2831.

form deviations from the prices which would otherwise prevail under the alleged pricing system and have resorted to other acts and practices to prevent price competition from imported cement.[1]

The Findings. The Commission has not found or purported to find that any of these seven respondents has been connected in any way with the issues concerning competition with imported Cement. There is not even a suggestion that any of these seven respondents participated in any activities of the nature charged in the complaint.[2]

The Proof. The record is devoid of evidence that any of these seven respondents ever took any steps or measures, or ever adopted or pursued any policy or practice with respect to competition with imported cement except that during the period of the NRA one company filed a protest against the dumping of foreign cement which was manufactured under labor standards totally dissimilar to those of the Code under which domestic manufacturers were operating.[3]

Here, again, there is a total failure of proof and no evidence to support any Findings against any of these seven respondents.

i. The Alleged Use of The Cement Institute to Interpret Policies of These Seven Respondents.

The argument with respect to the purposes, functions and activities of The Cement Institute will be adequately

[1] Complaint, Count I, Par. Seven (h), R. 164.

[2] Fdgs. Par. Nineteen, R. Vol. 24, pp. 16102-03.

[3] App. A, Part XVII, pp. 2735-36, 2748-49, 2808-09.

presented in the brief filed in Cases Nos. 23, 24 and 34. In what follows we shall demonstrate that these seven respondents' membership in, and relations with, The Cement Institute were at all times entirely legal.

Reasons for Joining The Cement Institute. It is undisputed that these seven respondents, except Spokane, first joined The Cement Institute in 1933 with the advent of the NRA in order to participate in the formulation of a Code for the cement industry pursuant to the National Industrial Recovery Act [48 Stat. 195 (1933)].[1] The respondent Spokane first became engaged in the production and sale of cement in May 1937 and has never joined The Cement Institute.[2] The undisputed evidence is that no services were rendered by The Cement Institute to any company on the Pacific Coast prior to the NRA, and that there has never been any division office of The Cement Institute on the Pacific Coast at any time.[3]

There is no evidence that in joining The Cement Institute in 1933 any of these seven respondents believed or had any reason to believe that the Institute was created or existed for any reasons or purposes not fully disclosed in its articles of association. The undisputed evidence is that the Code of Ethics of The Cement Institute was cancelled before any of these seven respondents became members and none of them ever signed or used the Code of Ethics.[4] Moreover, there is no evidence that any of these seven re-

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[1] Fdgs. Par. One (k) (2z) (3a) (3h) (3k) (3l) (4a), R. 15964, 15973-76, 15979; App. A, Part XVII, pp. 2740, 2810, 2856.

[2] Fdgs. Par. One (3l), R. 15975-76; App. A, Part XVII, pp. 2754, 2810.

[3] App. A, Part XVII, pp. 2739-40.

[4] App. A, Part XVII, pp. 2740, 2805.

spondents used an anti-diversion clause or ever took any measures or participated in any activities, with respect to diversions of shipments in transit.[5]

The Cement Institute Services. The Commission has found that The Cement Institute never issued any freight rate books for any of the territory in which these seven respondents market cement.[6]

The Commission in its Findings[7] has given an exaggerated importance to the land grant rate service of The Cement Institute. There is sworn testimony which is uncontradicted, and no proof or finding to the contrary, that none of these seven respondents ever forwarded any land grant rate information to The Cement Institute or ever requested any land grant rates from The Cement Institute or ever used any land grant rates issued by The Cement Institute.[8] Moreover, the Commission ignored the sworn testimony of responsible executives of these seven respondents denying that they ever agreed to use any land grant rates furnished by The Cement Institute or any particular land grant rates and testifying that their companies obtained such land grant rate information as they needed from the railroads.[9]

The undisputed evidence is that The Cement Institute has never rendered any contract reporting service on the Pacific Coast and none of these seven respondents ever furnished any information on contracts to The Cement Insti-

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[5] App. A, Part XVII, pp. 2735, 2803, 2856.

[6] Fdgs. Par. Eight (c), R. 16007-08; App. A, Part XVII, pp. 2742, 2769-70, 2851.

[7] Fdgs. Par. Eight (m), R. 16018-19. Cf. Fdgs. Par. Seven (o).

[8] App. A, Part XVII, p. 2743.

[9] App. A, Part XVII, pp. 2744-46.

tute; that none of these seven respondents ever participated in or used the statistical service of The Cement Institute or ever furnished any statistics to The Cement Institute except information as to monthly shipments for the purpose of fixing dues, which was the same information they furnished to the Bureau of Mines.[10]

The Commission has found that there was substantial uniformity of trade practices in the industry before the organization of The Cement Institute.[11] Full and accurate reports of all discussions at Cement Institute meetings were made available to the Commission and are in evidence. There is neither proof nor finding that any agreement was reached affecting any of the matters discussed. The Commission points to no uniformity of trade practice or custom followed by any of these seven respondents which is urged as even inferentially the result of activities at these meetings. There is not even a vestige of evidence of any restraint here. In fact, the clear and uncontradicted evidence is that each of these seven respondents has been continually active in endeavoring to take business from its competitors who were also members of The Cement Institute.[12]

Furthermore, the Commission ignored the uncontradicted testimony of responsible executives of these respondents and their competitors who were members of The Cement Institute denying that the Institute or any of its officers or trustees has ever influenced or attempted to influence them in the matter of prices or pricing methods or

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[10] App. A, Part XVII, pp. 2746-48, 2811, 2856.

[11] Fdgs. Par. Twenty-one (d) (e), R. 16116-19.

[12] App. A, Part XVII, pp. 2694-95, 2779-80, 2829-30.

sales policies or practices and denying the existence of any agreements with respect thereto.[13]

The Pacific Coast Cement Institute.[14] Another example of the Commission's misstatement of the evidence is the Finding that "the relationship between the Pacific Coast Institute and the Institute was close."[15] The uncontradicted evidence is that there was never any connection between The Cement Institute and the Pacific Coast Cement Institute. At one time in 1936 it was expected that a divisional office of the Cement Institute would be established in southern California but this represented only a hope that was never realized. Early in September 1936 the Cement Institute discontinued all division offices and on September 10th the application of the Southern California companies for the establishment of a divisional office was withdrawn. Subsequently, on September 21, 1936, a separate organization, the Pacific Coast Cement Institute was organized by the four southern California companies.[16] Calaveras, Oregon, Santa Cruz, Spokane and Yosemite joined it after the complaint herein was filed (R. 3474). The uncontradicted evidence is that the functions and activities of the Pacific Coast Institute were very limited. Its services consisted of the furnishing of general informa-

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[13] App. A, Part XVII, pp. 2811-12, 2856-57.

[14] Statement of Points No. 18 (eo), R. 16258.

Error has been assigned to the action of the Commission in receiving in evidence or giving any weight or consideration in its Findings to the evidence concerning the Pacific Coast Cement Institute on the ground that it has no bearing upon any of the issues in this proceeding.

[15] Fdgs. Par. Eight (o), R. 16021-22.

[16] App. A, Part XVII, pp. 2857-60, 2861-62, 2868.

tion and analyses of government reports and releases to all its members. In addition, the following services were rendered to the four member companies in southern California only: credit reports on delinquent accounts, reporting of specific job contracts and a land grant rate service. As to contract reporting, merely a synopsis was filed. Prices were not reported and there was no contract checking.[17] There is no proof or finding that these activities limited or tended to limit production or the amount of cement distributed to the trade. Cf. *Cement Manufacturers* case, 268 U. S. 588, at p. 603. As to the land grant rates service, the Pacific Coast Cement Institute upon request obtained land grant rates from the railroads serving the southern California territory and passed them on without comment to the company requesting the information. This service was established at the request of the railroads in order to avoid duplication of requests from different mills for the same information. No rates were sent to any of these seven respondents except Southwestern (Victorville).[18] There is no proof or finding that there was any interchange of land grant rates among any of the companies in northern California or the Washington-Oregon territory. There is no proof that any of these seven respondents except Southwestern (Victorville) ever requested information on land grant rates from the Pacific Coast Institute as needed, or at all and the Commission's Finding[19] to that effect is contrary to the evidence.

There is no charge in the complaint, nor any proof or finding that the Pacific Coast Cement Institute engaged in

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[17] App. A, Part XVII, pp. 2863-71.

[18] App. A, Part XVII, pp. 2865-68.

[19] Fdgs. Par. Eight (o), R. 16021-22.

any activities in furtherance of the alleged nationwide conspiracy to employ "what is known as a multiple basing point system of pricing". The mere fact that some of these respondents were members does not show or tend to show participation in the alleged conspiracy, nor is there any evidence otherwise that would support an inference of such participation by any of these seven respondents. *Davidson et al.* v. *United States,* 61 F. (2d) 250, 253 (1932); *Phelps Dodge Refining Co.* v. *Federal Trade Commission,* 139 F. (2d) 393, at p. 396. The fact is that the pricing policies and practices of the members of the Pacific Coast Cement Institute are at variance with the asserted "common purpose" of the alleged conspiracy and are, in themselves, the most convincing evidence of non-participation in any such conspiracy, assuming that it ever existed, which is denied.

The activities of The Cement Institute as well as those of the Pacific Coast Cement Institute, indicated hereinabove, are such as have had the approval of the Supreme Court under the principles laid down in the *Cement Manufacturers* case, 268 U. S. 588, in *Maple Flooring Manufacturers Ass'n* v. *United States,* 268 U. S. 563, and in *Sugar Institute* v. *United States,* 297 U. S. 553. To the extent that any of these seven respondents cooperated in such activities, therefore, no inference of illegality may be drawn. Accordingly, the Commission's Findings with reference to the activities of the Pacific Coast Cement Institute and of the Cement Institute, in so far as they are or may be construed to apply to any of these seven respondents, are invalid and not supported by evidence.

j. The Alleged Use of Advertising Concerning the Basing Point Method of Pricing Cement.

The Charge. The complaint alleges that respondents have sought to camouflage the alleged conspiracy by causing advertisements to be published concerning the basing point method of pricing.[1]

The Findings. The Commission found that there were protests against "substantial advances in the price of cement" during 1931 and 1932 and that as a result Institute members engaged in propaganda to allay the criticism.[2] There is no evidence to support this Finding as to any of these seven respondents. Furthermore, the Commission has found that no action was taken by any of these respondents with respect to the public relations plan submitted by the Cement Institute.[3]

The Proof. The undisputed evidence is that these seven respondents were not members of The Cement Institute in 1931 and 1932; further, that there were no such advances in price, nor any criticism, nor any propaganda in the marketing territory of any of these seven respondents.[4] There is no evidence that any of these seven respondents participated in any purpose to publish advertisements to promote a multiple basing point system of pricing and none is cited by the Commission. The clear and uncontradicted evidence is that these seven respondents did not join The Cement Institute, or remain members, with any such

[1] Complaint Count I, Par. Seven (j), R. 177.

[2] Fdgs. Par. Twenty-one (a), R. 16108.

[3] Fdgs. Par. Twenty-one (e), R. 16118-19.

[4] App. A, Part XVII, pp. 2739-40, 2697, 2739, 2777.

purpose, none of them understood that any such purpose was a function of The Cement Institute. There is nothing in the evidence relating to the Institute, its officers and other members to support an inference that any of these seven respondents participated in any such purpose or plan.[5] *J. B. Lippincott Co.* v. *Federal Trade Commission, supra,* 137 F. (2d) 490, 494-95.

5. *The Nationwide Conspiracy and Participation Therein by Any of These Seven Respondents Have Not Been Proved or Shown in the Alleged Effects Thereof.*

The Charge. The complaint alleges that the motive for the nationwide conspiracy as charged is unreasonable prices.[1] The complaint also states that respondents by agreement and conspiracy have deprived the public of the benefits of "delivery through means cheaper than all-rail transportation."[2]

The Findings. There is no finding that prices are or have been unreasonable. Instead the Commission *concluded,* without citing any evidence in support thereof, "that the general conditions shown to exist tend to coin-

[5] App. A, Part XVII, pp. 2748-49, 2812, 2857.

[1] "Thus respondents maintain * * * an artificial price level * * * The result is higher base prices and higher delivered prices to the consuming public" (Count 1, Par. 8 (b) (c) (j), R. 186, 189).

"The acts and practices in this Count * * * have increased the price of cement to the buying public" (Count I, Par. 11, R. Vol. 1, p. 213).

"The effect * * * has been and now is to bring about * * * prices calculated to preserve the more poorly located, equipped, and conducted units at the expense of the buying public" [Count 1, Par. 9 (i)].

[2] Complaint, Count I, Par. 8 (g), R. 187-88.

cide with rather than to contradict the direct proof of restraints imposed upon competition by respondents."[3] There is no such proof and no evidence to warrant or support such a conclusion with respect to any of these seven respondents.

The Proof. It is not disputed that since 1925 the costs of production and selling costs of these seven respondents have increased considerably while, however, the level of cement prices has not increased although the record discloses numerous fluctuations in prices in response to competitive conditions.[4] The undisputed evidence is that of the thirteen cement mills that had been constructed in California up to the time of the complaint only eight have survived, revealing a mortality rate of approximately 40%. Five mills were unable to survive in the face of the competition and have been abandoned or have ceased to operate. The mills that have survived have been kept modern by constant maintenance and technological improvements to reduce costs of manufacture and to improve the quality of the product.[5] The only inference possible, if any inference is to be drawn, is that the public interest has not suffered in any of the marketing territory of these seven petitioners. No new plants were built in California in the eight year period during which the alleged, nationwide conspiracy is supposed to have flourished. Commission's counsel *conceded* that there is no evidence of artificial

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[3] Fdgs. Par. Twenty-three (f), R. 16127.

[4] App. A, Part XVII, pp. 2682, 2739, 2855-56, 2777.

[5] App. A, Part XVII, pp. 2673-78, 2752-55, 2813-14.
The plant at Merced was dismantled, and Yosemite went out of business and was dissolved subsequent to the complaint.

increase in capacity or of any agreement either to increase or decrease capacity.[6] All of the foregoing evidence was completly ignored by the Commission in its Findings. Any consideration of this important evidence would have shown at once the absurdity of the Commission's charges.[7]

Eminent economists testified in this proceeding that they would regard a moderate rate of return as one of the indicia manifesting the presence of competition among manufacturers in this industry.[8] Accordingly, in order to negative any inference that such a conspiracy as is here charged ever existed and to show the non-existence of a restraint upon competition, all respondents offered to prove, through Messrs. Ford Bacon & Davis and Price Waterhouse & Company, that earnings over the eight year period covered by the complaint were approximately three per cent (3%) based upon the actual cost of assets used in the manufacture of cement and depreciated in accordance with the rates of Bureau of Internal Revenue.[9] Confronted with these facts Commission's counsel completely abandoned the alleged motive for a conspiracy and declared that there was no issue as to reasonableness of prices. The wholly unsupported charge that price bases were placed high enough to permit freight absorption was relegated to the category of "merely pleader's conclusions" and all of respondents' evidence, which these seven respondents have now moved this Court to adduce, was rejected by the Trial

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[6] App. A, Part XVII, pp. 2677-78 (R. 11766).

[7] Cf. Fdgs. Par. Twenty-three (f), R. 16127.

[8] App. A, Part XIX, pp. 3011, 3029-31.

[9] Statement of Points No. 39f.

Examiner.[10] We contend, therefore, that there is no support for any inference of restraint of competition among these seven petitioners and that Paragraph twenty-three of the Findings is erroneous and improper and is not supported by any evidence as to any of these seven respondents.

Likewise, with respect to the charge that respondents have "monopolized the benefits of cheaper means of delivery," there is no finding or proof of any such benefits in any of the market territory of these seven respondents.[11] Counsel for the Commission elicited testimony of *non-respondents* as well as petitioning manufacturers concerning the comparative cost of truck and rail delivery. The consensus of this testimony is that the cost of truck delivery is in general not lower than cost of rail delivery and is often higher, and that there is no saving in cost to be realized by truck delivery.[12] The Commission's Finding therefore, is concerned with purely hypothetical benefits and is not supported by any evidence as to any of these seven respondents. Here, as elsewhere, there is a total failure of proof and no foundation for the Commission's charge.

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[10] R. 11350-51 Commission's Counsel said:

"Mr. Wooden has admitted he will not use any of the statements as to the effects there or any evidence relating to the statements of effects as appear within paragraphs 8 and 9 of that complaint to prove the existence of a combination."

See also R. 14890-908, 15159; R. 40164-65.

[11] App. A, Part XVII, pp. 2733-34, 2801, 2850.

[12] App. A, Part XVII, pp. 2730-33, 2798.

6. *The Activities of These Seven Respondents in the Preparation and Amendment of the N.R.A. Code and in Compliance Therewith Afford No Inference of Conspiracy.*

The Charge. The complaint makes no charge with respect to the activities of any of the respondents during the NRA period except that it alleges that respondents attempted to obtain a Code provision requiring the classification of customers.[1]

The Findings. In the Findings great weight is given to the NRA evidence[2] which we contend may not be used as proof of conspiracy because the participation by members of the cement industry in those activities is exempted under the anti-trust laws. The Commission incorporated in its Findings garbled excerpts from correspondence between the Code Authority and members of the industry who were prospective bidders on the Bonneville Dam lettings and purported to find that this "involved cooperation among the respondents concerned which amounted to agreements upon bids to be made."[3] We deny that the evidence establishes any such thing.

The Proof. The evidence affecting these seven respondents consists of records of negotiations having to do with the submission and approval of a Code for the Cement Industry and amendments thereto, and evidence as to compliance with the Code with respect to price filing and other

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[1] Complaint, Count I, Par. Seven (e), R. 144.

[2] Fdgs. Pars. Seven (p) (r), Eight (j) (k) (l) (m), Seventeen (d) (e), R. 16001-04, 16014-19, 16093-98.
Statement of Points Nos. 9 (g), 41, 45, R. 16239, 16286, 16289.

[3] Fdgs. Par. Eight (l), R. 16016-18.

matters.[4] The evidence shows that cement manufacturers were free to quote f.o.b. mill prices as well as f.o.b. destination prices provided that such prices were filed in accordance with the Code, and that these seven respondents did file and quote f.o.b. mill prices.[5]

The excerpts referring to the Bonneville Dam bids, which were lifted out of their context by the Commission, together with the related exhibits and testimony which the Commission studiously ignored, show that the pre-bidding correspondence arose from the fact that the invitations required an affidavit of compliance with the Code and the bidders were anxious to avoid violating the Code; further, that even after this correspondence the bids submitted by two of the bidders were found by the Administrator of the NRA to be in violation of the Code—because bidders could only bid prices which were on file five days prior to the opening date—and the War Department affirmed that decision and rejected the bids. Upon readvertisement most of the bidders bid the price which was on file with the Code Authority, based upon the land grant rates furnished by the Government to all bidders. It is undisputed that this price was 54¢ lower than the price which had been filed for the earlier letting but the Commission ignored this fact in the Findings and created a distorted picture.[6] This was error. *Tesch* v. *Industrial Commission*, 200 Wis. 616, 229 N. W. 194, 197 (1930).

The Law. All of the NRA evidence was introduced over respondents' objections and we still maintain that it

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[4] App. A, Part XVII, pp. 2704, 2712-24, 2740-42, 2810, 2856, 2876, 2887-90.

[5] App. A, Part XVII, pp. 2704-05, 2708-12.

[6] App. A, Part XVII, pp. 2713-21.

was improperly admitted. The evidence clearly indicates that Code practices were abandoned by these seven respondents at or prior to the time the *Schechter* decision was handed down by the Supreme Court. Such being the case, evidence as to the activities of these seven respondents under the Code throws no light upon their activities thereafter and should not be considered in this proceeding in which the charge is that the respondents have conspired to employ "what is known as a multiple basing point system of pricing". Neither that conspiracy nor participation therein by any of these seven respondents can be shown by actions which were sanctioned and made lawful by due exercise of the legislative power. The provisions of the Code for the Cement Industry were authorized by the National Industrial Recovery Act [48 Stat. 195 (1933)] and the collective activities of these seven respondents during the NRA period were encompassed by such provisions. Neither of these statements is challenged in the Commission's Findings. Therefore, under Title I, Section 5 of the Act and the statements of this Court in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 225-7 (1940), and of the decision in *Eugene Dietzgen* v. *Federal Trade Commission*, 142 F. (2d) 321, 328 (1944), each of these seven respondents should have immunity from charges of having violated the anti-trust laws and no unlawful purpose should be attributed to their adherence to the Code.

Such identity of price quotations of these seven respondents and other bidders on public lettings as is shown during the Code Period is attributable to Code enforcement. Under the Code, cement manufacturers were required to observe their filed prices. Adherence to such prices had a natural tendency to eliminate or lessen price

deviations as well as to reduce the frequency of price changes. That the codes approved under the NIRA should so provide was unquestionably contemplated by the Act. We contend, therefore, that no inference of illegal combination whatsoever may be drawn from such uniformity of prices or practices.

7. None of These Seven Respondents Has Been a Party to Any Activities of the Early Trade Association, the Records of Which Appear in the Commission's Findings.[1]

The Charge. The complaint makes no charge whatsoever with respect to the activities of the early trade associations or of any association, except The Cement Institute.

The Findings. In its Findings[2] the Commission relies heavily upon the ancient evidence concerning the early trade associations that existed in some parts of the country between 1902 and 1919, all of which was received in evidence over objection. The Commission has not found or purported to find that any of these seven respondents was a member of the associations mentioned[3] or that any of these seven respondents participated in the asserted concert of action or activities[4] referred to and there is no evidence upon

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[1] Statement of Points Nos. 9 (f), 15 (a)-(c), 17 (l)-(n), 24 (b) (c), 25 (b) (c), 27 (c) (d), 30 (a) (e), 40 (d), 41, 45, R. 16239, 16243-46, 16248-51, 16265-67, 16269-70, 16272-73, 16276-77, 16286, 16289.

[2] Fdgs. Pars. Five, Six (a), Seven (i)-(k), Eight (b) (d), Thirteen (c), Fourteen (b) (c), Fifteen (b), Seventeen (b), Twenty (a) (c), R. 15983-84, 15992-97, 16006-09, 16060-61, 16065-69, 16071-72, 16090-91, 16104-06.

[3] Fdgs. Pars. Five and Eight (b). R. 15983, 16006-7.

[4] Fdgs. Par. Seven (i)-(l). R. 15992-9.

which such a finding could be made. Furthermore, taken at their face value these excerpts do not constitute, in whole or in part, a finding of the alleged nationwide conspiracy among the seventy-five respondents below to employ "what is known as a multiple basing point system of pricing."

The Law. Without going into greater detail, for this aspect of the Findings will be argued adequately by the brief filed in Cases Nos. 23, 24 and 34, the correct legal principles may be simply stated. First, the matters referred to in these records of activities of early trade associations have nothing whatsoever to do with the Cement Institute or its members. Second, the facts recited in these records are too remote in period to prove or disprove any issue in this proceeding. Third, the declarants and the authors of the records are all dead and there can be no way of establishing the truth or falsity of the matters contained therein. All of this so-called evidence is, therefore, legally incompetent as proof of the alleged nationwide conspiracy and the asserted activities are of no consequence whether considered by themselves or with reference to the charges against the respondents in this proceeding before the Commission. *A fortiori,* all of this material is incompetent as proof of participation by any of these seven respondents in the alleged nationwide conspiracy, even if it be assumed that such conspiracy ever had any existence in fact, which we deny. Most of these seven respondents came into existence many years after those early associations were dissolved. Whatever weight the Commission may have given to these records is completely dissipated by the character of the evidence. Incompetent evidence does not fulfill the requirement that find-

ings, to be conclusive, must be supported by substantial evidence. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, at pp. 227-29.

8. The Testimony of Economists Affords No Evidence of Conspiracy.

With respect to the opinion testimony of economists contained in the record in this proceeding these seven respondents adopt the arguments presented and the authorities cited in support thereof in the brief filed in Cases Nos. 23, 24 and 34.

Separate Defense of the Respondent Spokane

The respondent Spokane has consistently taken the position that it should be dismissed from these proceedings as it is apparent that the Commission's complaint is directed against a former company of the same name and not against the respondent Spokane. It is undisputed that respondent Spokane was not incorporated until February 5, 1937 and did not engage in the production of cement until May 6, 1937. The former company doing business under the name Spokane Portland Cement Company changed its name to International Portland Cement Company, Ltd. on February 13, 1937 and then dissolved, which dissolution was completed on November 29, 1937.[1]

The dissolution of the company which was in existence during the period of time with which the complaint is concerned put an end to its existence for litigation purposes. *Chicago Title & Trust Co.* v. *4136 Wilcox Bldg. Corp.*, 302 U. S. 120.

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[1] Fdgs. Par. 1 (31); R. 14974-77.

The respondent Spokane is not responsible for the acts of its predecessor and should be dismissed, for as is said in *United States Oklahoma Natural Gas Co.* v. *State of Oklahoma*, 273 U. S. 257:

> "There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation."

The dissolution of the company which was in existence during the period of time referred to in the complaint ousted the jurisdiction of the commission. *Arrow-Hart & Hageman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed as to these seven Pacific Coast Respondents.

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SUPPLEMENT I

Papers Concerning the Dissolution of Petitioner Yosemite

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

DOCKET No. 3167

In the Matter

of

THE CEMENT INSTITUTE,

an unincorporated association, and others.

Affidavit of Dissolution of Yosemite Portland Cement Corporation

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss.:

E. T. Wylie, being first duly sworn, deposes and says:

That she is Secretary of Yosemite Portland Cement Corporation, a dissolved corporation, one of the defendants in above-entitled action;

That on September 30, 1940, said Yosemite Portland Cement Corporation resigned its membership in the Cement Institute; that in August, 1944, said corporation sold its cement mill and equipment, together with its good-will, to Henry J. Kaiser Company and shortly thereafter perma-

nently abandoned the manufacture and sale of cement; that on December 11, 1944, said corporation, by compliance with the requirements of the appropriate provisions of the Corporation Laws of the State of Delaware (under which laws said corporation was organized), was dissolved and on said day the Secretary of State issued his certificate certifying to such dissolution; that a certified copy of said Certificate is hereunto annexed; that since December 11, 1944, said corporation has been engaged in no business whatsoever except business incidental to the winding up of its affairs and the distribution of its net assets to stockholders.

Dated, March 8, 1946.

E. T. WYLIE,
Secretary.

Subscribed and sworn to before me this 14th day of March, 1946.

ELLA COOK KELLY,
NOTARY PUBLIC in and for the City and County of San Francisco, State of California.
My Commission Expires: December 23, 1948.

(Seal)

STATE OF DELAWARE

(Emblem)

OFFICE OF SECRETARY OF STATE

CERTIFICATE OF DISSOLUTION

To All Whom These Presents May Come, Greeting:

Whereas, It appears to my satisfaction by duly authenticated record of the proceedings of the voluntary dissolution thereof, by the consent of more than two-thirds in interest of all the stockholders deposited in my office, the Yosemite Portland Cement Corporation, a corporation of this State whose principal office is situated at No. 19-21 Dover Green, in the City of Dover, County of Kent, State of Delaware United States Corporation Company, being agent therein, and in charge thereof, upon whom process may be served, has complied with the requirements of the Corporation Laws of the State of Delaware, as contained in 2033. Section 1, to 2246. Section 214, Chapter 65, of the Revised Code of 1935, as amended, preliminary to the issuing of this

CERTIFICATE OF DISSOLUTION

Now, therefore, I, William J. Storey, Secretary of State of the State of Delaware, do hereby certify that the said corporation did on the eleventh day of December A.D. 1944 file in the office a duly executed and attested consent, in writing, to the dissolution of said Corporation executed by the consent of more than two-thirds in interest of all the stockholders thereof, which said consent and the rec-

ords of the proceedings aforesaid, are now on file in my office as provided by law.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover, (OFFICIAL SEAL) this eleventh day of December in the year of our Lord one thousand nine hundred and forty-four.

WILLIAM J. STOREY,
Secretary of State.

STATE OF DELAWARE

(Emblem)

OFFICE OF SECRETARY OF STATE

I, WILLIAM J. STOREY, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Dissolution of the "Yosemite Portland Cement Corporation," issued by this office the eleventh day of December A.D. 1944, at 1 o'clock P.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover, this fourth day of March in the year of our Lord one thousand nine hundred and forty-six.

(OFFICIAL SEAL)

WILLIAM J. STOREY,
Secretary of State.